

89-446

Supreme Court, U.S.
FILED
AUG 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

MERLE EDWARD KING,
PETITIONER

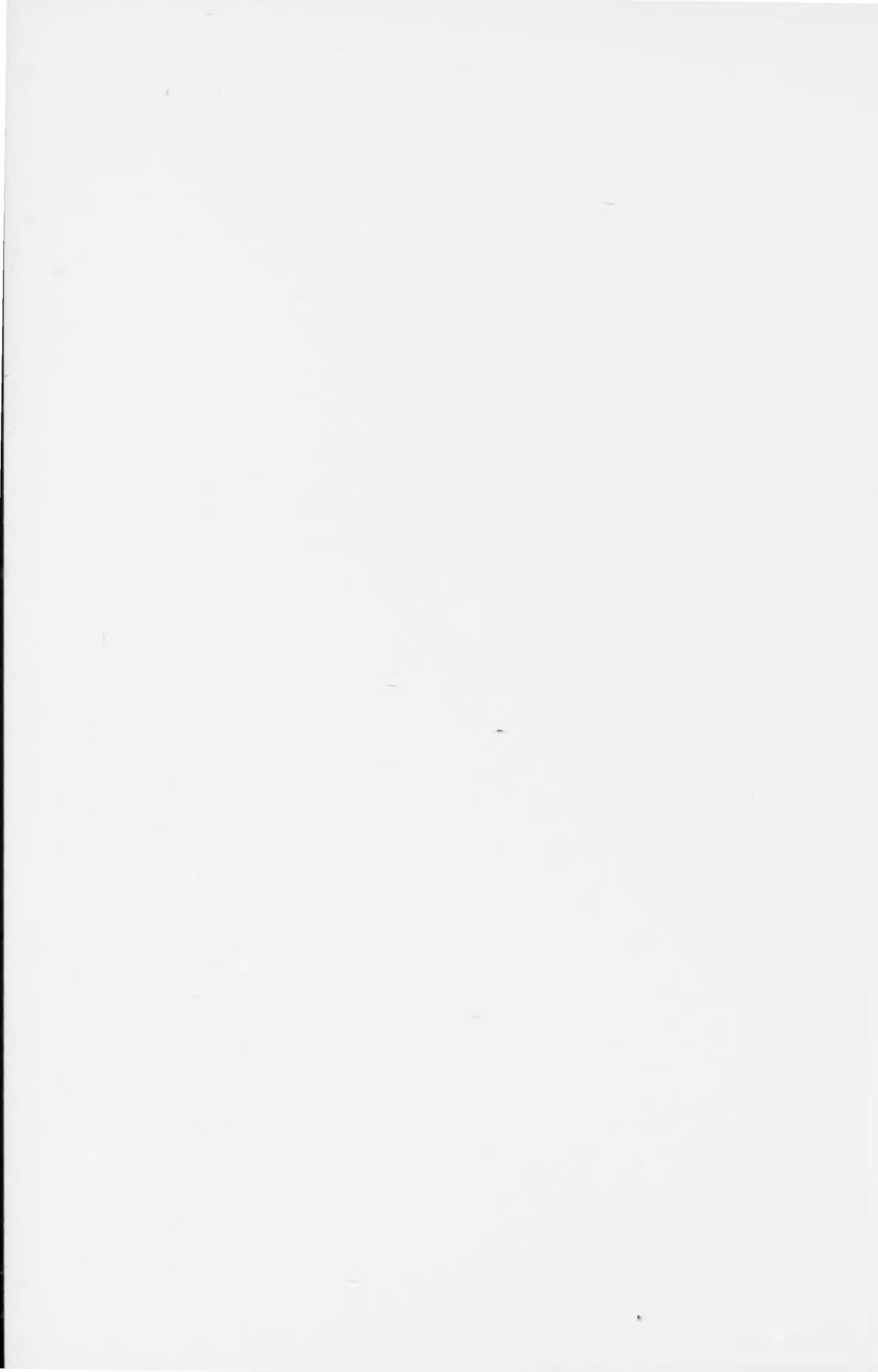
v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR
A WRIT OF CERTIORARI

Appeal from the United States Court of
Appeals for the Third Circuit Court of
Appeals at No. 88-3619, Order affirming
Judgment of the District Court

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QUESTIONS FOR REVIEW

- I. DID THE DISTRICT COURT ERR IN DENYING THE DEFENDANT KING'S REQUEST FOR LIMITING INSTRUCTION TO THE JURY AS TO THE PROPER CONSIDERATION TO BE GIVEN THE EVIDENCE OF DEFENDANT'S POSSESSION OF FIREARMS AND OTHER WEAPONS UNDER RULE 404(b) OF THE FEDERAL RULES OF EVIDENCE?
- II. DID THE TRIAL COURT ERR IN DENYING DEFENDANT KING'S MOTION TO REDACT FROM THE INDICTMENT PRIOR TO SUBMITTING IT TO THE JURY THE ALLEGATION THAT THE DEFENDANT WAS THE "NATIONAL PRESIDENT OF THE PAGAN MOTORCYCLE CLUB" WHEN NO EVIDENCE OF SUCH WAS PRODUCED BY THE GOVERNMENT?
- III. DID THE TRIAL COURT ERR IN DENYING DEFENDANT KING'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT IV OF THE INDICTMENT, IN THAT THE GOVERNMENT FAILED TO PROVE THAT THE DEFENDANT POSSESSED PHENCYCLIDINE ON OR AROUND THE LAST WEEK OF MAY, 1983?

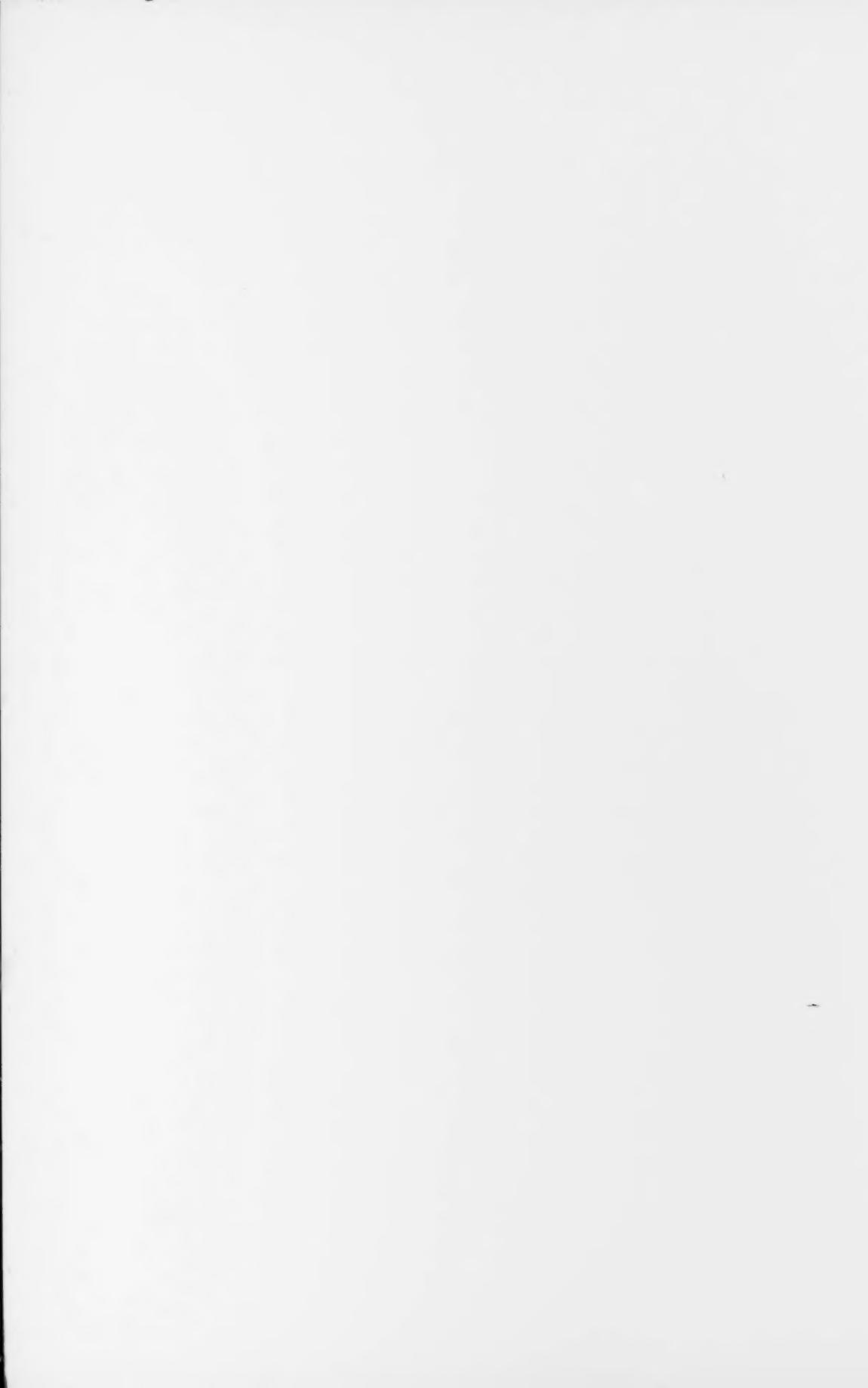


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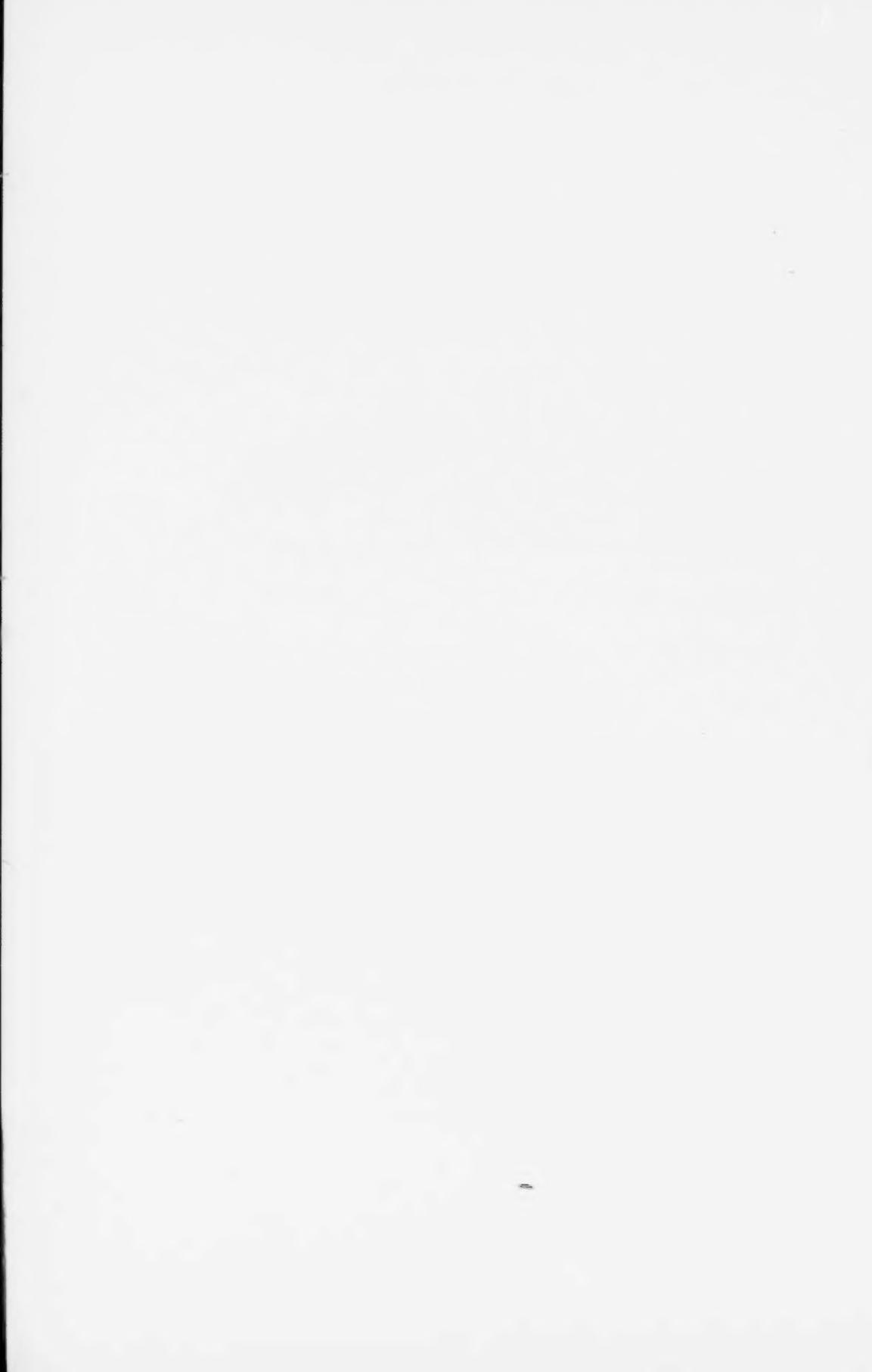
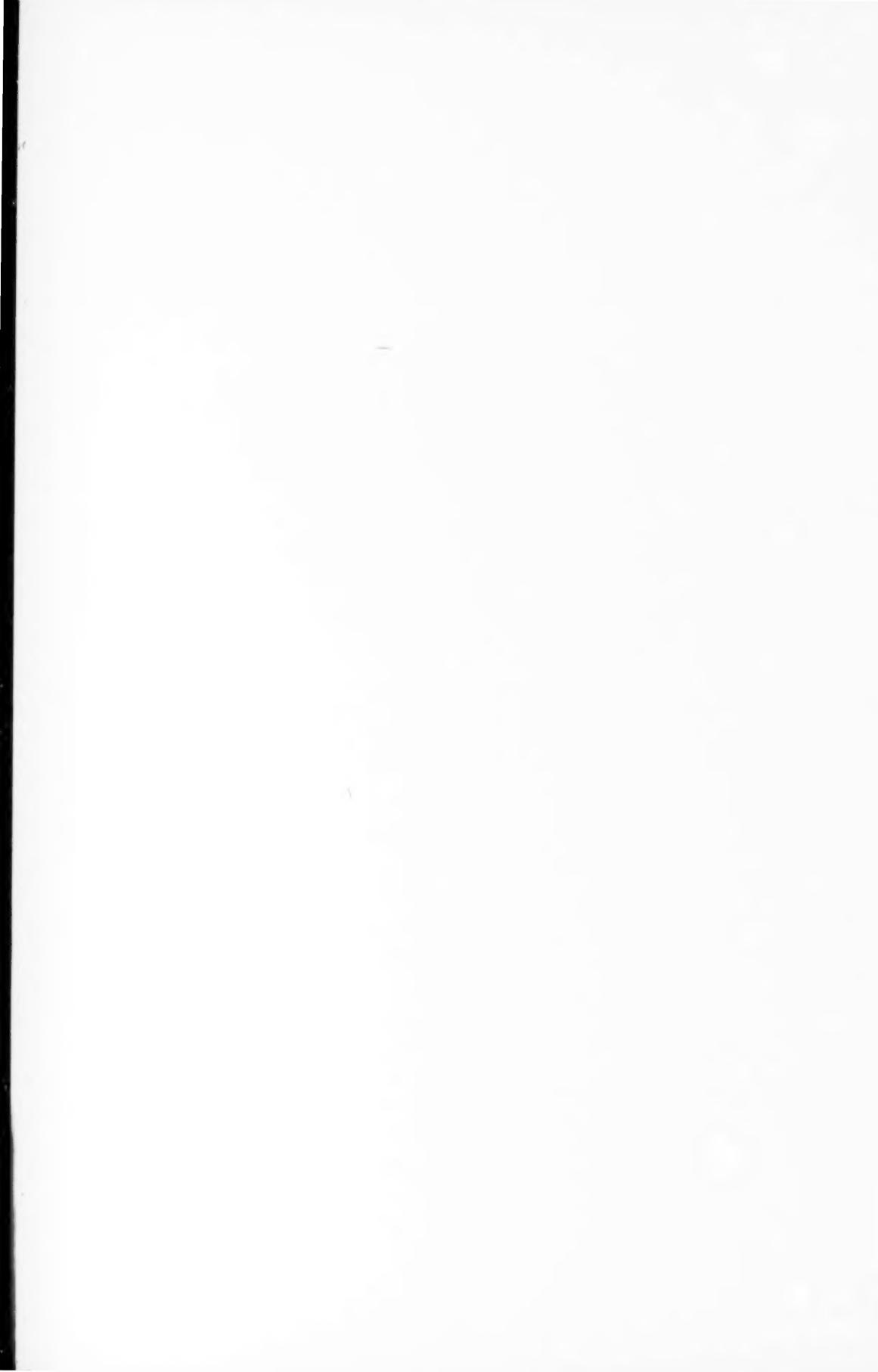


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OPINION BELOW

The Petitioner appealed from the judgment of sentence entered September 9, 1988 before the United States District Court for the Western District of Pennsylvania at CR88-61. The United States Court of Appeals for the Third Circuit affirmed the judgment of sentence at No. 88-3619 on June 20, 1989 without written opinion.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254. The judgment of sentence was affirmed by the United States Court of Appeals for the Third Circuit on June 20, 1989 and this Petition is filed within sixty (60) days thereafter.



CONSTITUTIONAL PROVISIONS

Fourteenth Amendment to the Constitution of
the United States:

". . . nor shall any state deprive any
person of life, liberty or property
without due process of law"

STATEMENT OF CASE

The Appellant, Merle King, was indicted by the United States Government on seven (7) counts of criminal offenses involving conspiracy and the knowing, willful and unlawful conduct and participation, directly and indirectly in the conduct of the affairs of the Pagan Motorcycle Club, an enterprise engaged in the activities of which affected interstate commerce, through a pattern of racketeering activity as that term is defined in Title 18, United States Code, Section 1961(5) together with five (5) substantive counts of distribution of a controlled substance.

On July 27, 1988, the Appellant was convicted by a jury upon all Counts. This case essentially involves the participation of the defendant in the conduct of the



affairs of the Pagan Motorcycle Club in the distribution of controlled substances in the area of Western Pennsylvania. The Government alleged in the Indictment and presented evidence at trial that the Pagan Motorcycle Club was an enterprise engaged in the distribution of controlled substances through its members, and that the defendant was a member of the "Mother Club" of the Pagan Motorcycle Club. The "Mother Club" was alleged to be a group of individuals having authority over chapters and members of the club in their area. The "Mother Club" consisted of a National President, a National Vice-President, a National Sergeant of Arms, a National Treasurer and approximately ten to fifteen other members. The "Mother Club" chapter had final authority over all Pagan

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Motorcycle Club matters. It was this organization, the Pagan Motorcycle Club, which the Government alleged, constituted an enterprise as defined by Title 18, United States Code, Section 1961(4) which was engaged in activities affecting interstate commerce, namely the distribution of controlled substances. In its Indictment which was presented for the jury for their reading during deliberations, the defendant, Merle King, was listed as the "National President" of the Pagan Motorcycle Club and advisor to the Greensburg Chapter of the Pagan Motorcycle Club. The Indictment read that "each Mother Club advisor had authority over the chapters and members in his area subject only to the final authority of the Mother Club chapter and the National President of the Pagan Motorcycle Club."

(See page 2, Indictment)



Charged together with the Defendant in this Indictment were five (5) other co-defendants, four of whom were alleged to be Pagan Motorcycle Club Members, and two of those alleged to be members of the "Mother Club" chapter.

At trial the Government presented various witnesses who testified that they bought or sold "Killer Weed" in conjunction with the defendant, Merle King. Those witnesses identified the defendant as a "Mother Club Member". The defendant was charged with five separate counts of possession with the intent to distribute phencyclidine, a/k/a "Killer Weed". Further, the Government introduced a cache of weapons including handguns, knifes, switchblades, brass knuckles and rifles seized from the defendant's residence in



January of 1984. Defense counsel objected to the introduction of said weapons as evidence of extrinsic crimes that would improperly prejudice the jury. The Learned District Court admitted the weapons evidence under 404(b) of the Federal Rules of Evidence. Thereafter, defense counsel requested the District Court grant a limiting instruction as to such evidence. That instruction was denied.

The District Court in it's discretion, provided the jury with redacted copies of the indictment for their use during deliberations. Defense counsel requested the Learned Court denied defense motion to strike from the indictment allegations that the defendant was "National President" of the Pagan Motorcycle Club in that no evidence was produced that defendant held such position.

REASONS FOR GRANTING WRIT

I. Q. DID THE DISTRICT COURT ERR IN
DENYING THE DEFENDANT KING'S
REQUEST FOR LIMITING INSTRUCTION
TO THE JURY AS TO THE PROPER
CONSIDERATION TO BE GIVEN THE
EVIDENCE OF DEFENDANT'S
POSSESSION OF FIREARMS AND OTHER
WEAPONS UNDER RULE 404(b) OF THE
FEDERAL RULES OF EVIDENCE.

A. YES.

During a search of appellant's residence, government agents seized a number of weapons located in various parts of the appellant's apartment. Those weapons included pistols, rifles, switch blades, buck knives and brass knuckles. The government at trial, introduced this



cache of weapons under 404(b) of the
Federal Rules of Evidence.

Appellant acknowledges that evidence
of the presence of weapons in the residence
of the appellant at a time when he is
alleged to have distributed controlled
substances is relevant and admissible.

U.S. v. Picklesimer, 585 F.2d 1199 3rd Cir.
(1979), U.S. Wiener, 534 F.2d 15, (2nd Cir.
1976). This evidence is admissible as
evidence properly admitted under 404(b) as
"proof of motive, opportunity, intent,
preparation, plan, knowledge, identity, or
absence of mistake or accident." This
evidence is relevant in that it has
uniformly been recognized that substantial
drug dealers in narcotics possess firearms
and that such weapons are as much tools of
the trade as more commonly recognized drug



paraphernalia. U.S. v. Payne, 805 F.2d 1062 (D.C. Cir. 1986), U.S. Sarda-Villa, 760 F.2d 1232 (11th Cir. 1985).

Just as uniformly recognized is the principle that such evidence is not admissible to show that a person is a person of bad character. Rule 404 provides that "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion."

This evidence having been properly admitted, defense counsel requested the trial court to instruct the jury as follows:

"There have been admitted in evidence certain weapons found in the possession of the defendant King. You must understand that the admission of that evidence is for a limited purpose. The possession of these weapons by the defendant King does not



bear upon Mr. King's character and you may not consider those weapons for that purpose."

Appellant submits that the above requested cautionary instruction was a fair request on the limited use to which the guns could be put.

The failure of the Trial Court to grant the above instruction is plain error in light of the facts of this case. The appellant was charged as a participant in an enterprise engaged in and the activities of which affected interstate commerce, through a pattern of racketeering activity as defined in 18 U.S.C. Section 1961. The Government alleged in it's indictment that the participants, i.e. the enterprise, the defendants, did combine to directly and indirectly, conduct the affairs of the Pagan Motorcycle Club. The indictment did specifically charge as follows:



". . . an enterprise engaged in and the activities of which affected interstate commerce, through a pattern of racketeering activity, as that term is defined in Title 18 United States Code, Section 1961(5), consisting of two or more acts of the following:

(d) criminal solicitation to commit murder, in violation of of the Pennsylvania Crimes Code, Title 18 P.S. Section 902(a)"

The Government at trial introduced evidence that a co-defendant, Murray, did solicit a government informant, Cichowicz, to murder a third person by means of poison, gun fire or stabbing. The government sought to prove; and, did elicit testimony of Cichowitz that extremely violent scenarios were discussed by Murray and Cichowicz in planning the demise of the third party.

The Government further charged the defendant, King, with threatening another with a knife.



The Government produced testimony at trial from a witness Slonecki as to the incident recounted in Paragraph (i) above. The defense produced several witnesses who testified contrary to the Government witness, Slonecki and who portrayed Slonecki as the perpetrator of violence in that incident.

In that the Government alleged that the defendant committed a violent act and alleged that act as an overt act, in furtherance of the conspiracy, and did conspire and combine with others to commit violent acts under Count Two of the indictment, the above cautionary instruction was not only proper but necessary for the fair consideration of the evidence.



The evidence of weapons, especially of brass knuckles and switch blades, was evidence of an extrinsic crime, i.e. the possession of prohibited offensive weapons. The evidence attempts to paint the defendant as a violent person, who is likely to commit crimes. Acknowledging that the Government offered; and admitted the cache of weapons as specific equipment that the defendant might use in selling drugs, that limited purpose must be clearly stated to the jury. The jury must be instructed that the evidence of weapons is not evidence of bad character, by inference, nor evidence of defendant's prosperity to commit other violent acts. Especially, where weapons such as brass knuckles are defined as prohibitive offensive weapons. It is recognized that

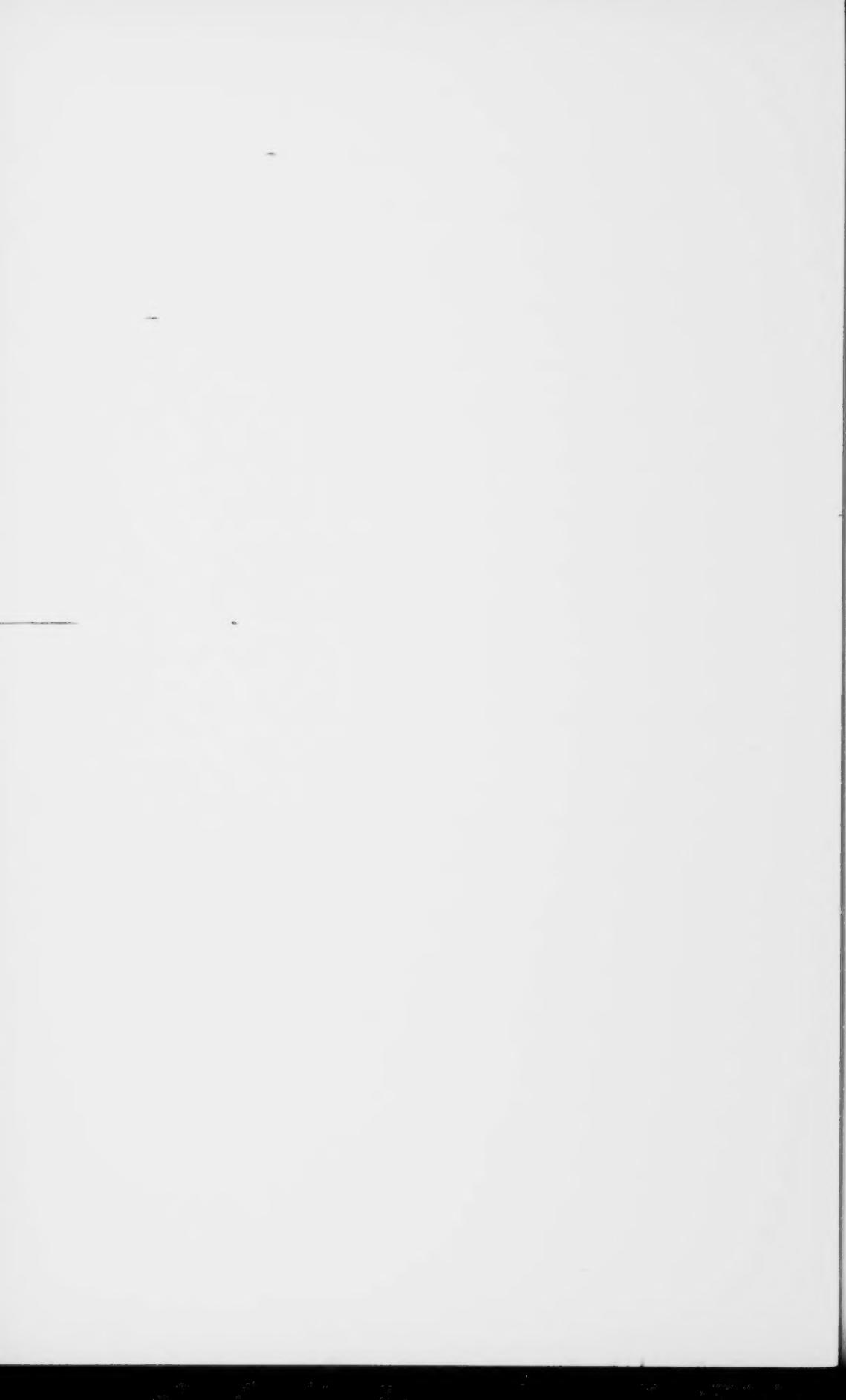
juries are prone to draw illogical and incorrect inferences from such evidence.

U.S. v. Bussey, 139 U.S. App. D.C.

268, 273, 432 F.2d 1330, 1335 (D.C.Cir. 1970).

The defendant was found guilty of conspiracy to violate 18 U.S.C. 1962; and, of participating in an enterprise engaged in and the activities of which, affected interstate commerce, through a pattern of racketeering activity in violation of 18 U.S.C. 1962(C). The overt acts alleged in the above violations included acts of violence.

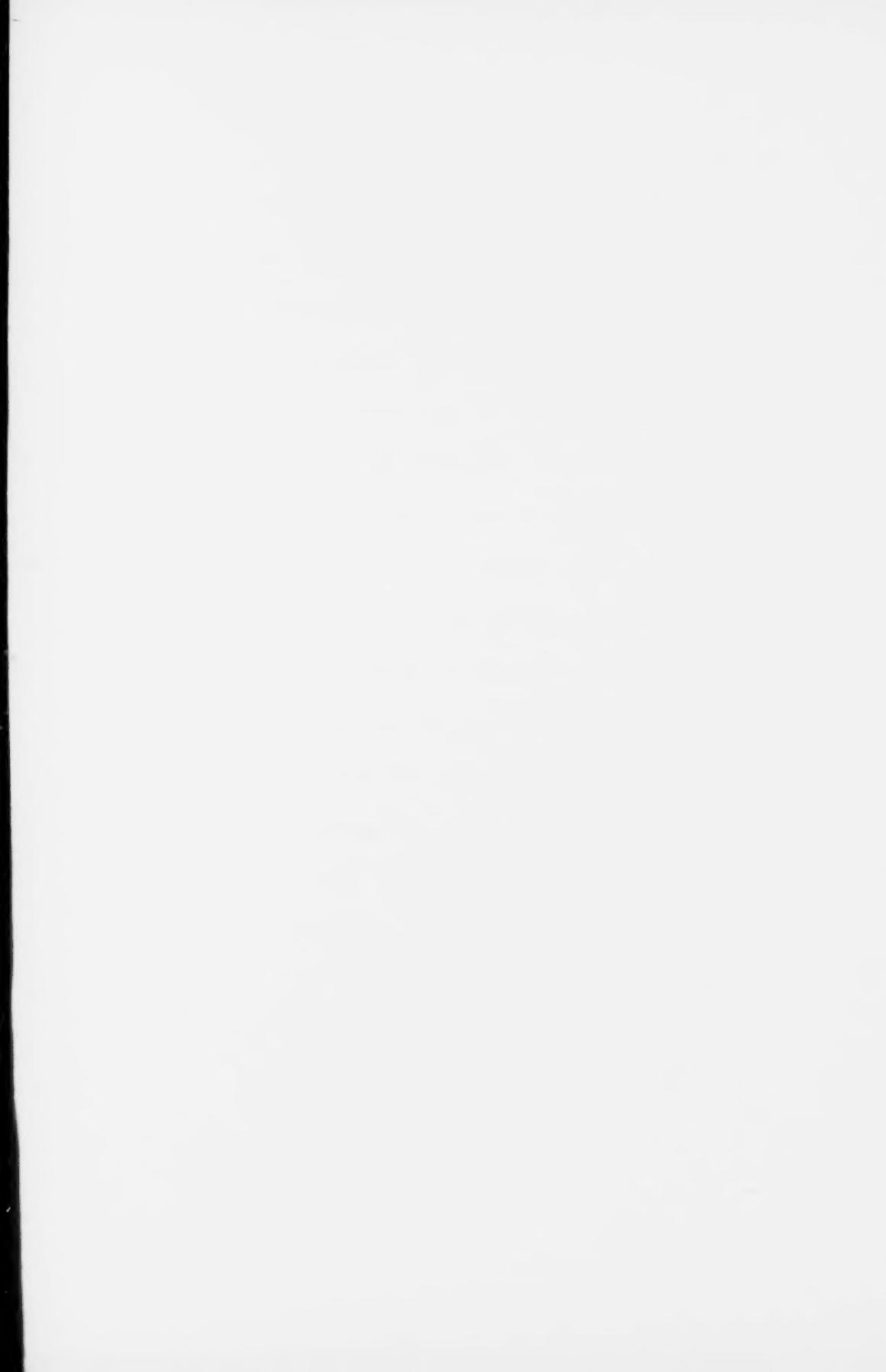
The Government, in closing, paraded the whole of the cache of weapons before the jury, knives, handguns, rifles and brass knuckles, then argued the nature of the person who possessed such weapons. Such evidence and argument leads to



confusion on the part of the jury.

Therefore, a cautionary and limiting instruction was necessary. Otherwise, the defendant is portrayed as an undesirable, a member of the underworld, and thus, a person likely to be guilty of "something".

A person who likely committed one of the violent overt acts alleged. The Trial Court's failure to grant and give a cautionary and limiting instruction is reversible error. Whenever prosecution evidence is introduced which is admissible only for a limited purpose, the defendant is entitled to instructions which inform the jury of the proper use which may be made of the evidence. U.S. v. McClain, 440 F.2d 241 (D.C.1971).



II. Q. DID THE TRIAL COURT ERR IN
DENYING DEFENDANT KING'S
MOTION TO REDACT FROM THE
INDICTMENT PRIOR TO
SUBMITTING IT TO THE JURY THE
ALLEGATION THAT THE
DEFENDANT WAS THE "NATIONAL
PRESIDENT OF THE PAGAN
MOTORCYCLE CLUB" WHEN NO EVIDENCE
OF SUCH WAS PRODUCED BY THE
GOVERNMENT?

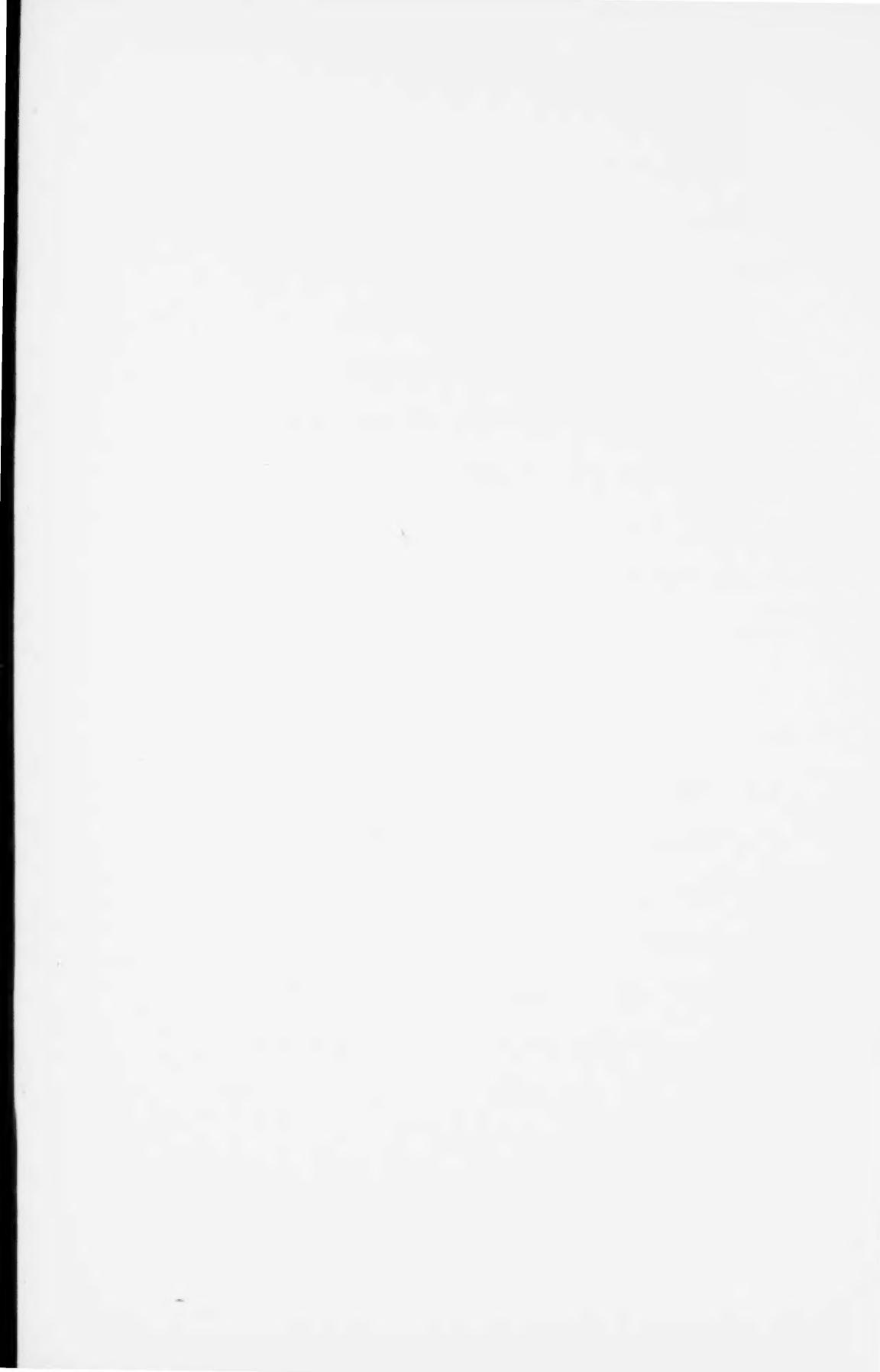
A. YES

The Government in this case alleged
that Defendant King, through his
affiliation with the Pagan Motorcycle Club
engaged in a criminal enterprise which
affected interstate commerce through a
pattern of racketeering activity. In Count



I, subparagraph (1) of the Government's Indictment, the Government alleged that the Pagan Motorcycle Club was an organization consisting of various local chapters located in various states including Pennsylvania, New York, New Jersey, Ohio, Delaware, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia and Florida. In Count I, subparagraph (3) of a 30 count Indictment, the Government alleged that Defendant King was ". . . the National President of the Pagan Motorcycle Club . . .".

During the course of the trial, the Government presented no evidence whatsoever of Defendant King's status of "National President" of the Pagan Motorcycle Club. Further, the Government did not argue that



the evidence as presented could allow the jury to reasonably infer that Defendant King held that status.

The learned Trial Court determined that a copy of the Indictment would aid the jury during deliberations and directed that an unredacted copy of the indictment be submitted to the jury during their deliberations. Counsel for Defendant King made a timely objection and requested that the allegation contained in Count One, subparagraph (3) that Defendant King was the National President of the Pagan Motorcycle Club be redacted. The learned Trial Court denied said request.

It is acknowledged that submission of the indictment to the jury is a matter within the sound discretion of the Trial Court provided the jury is properly



admonished that the indictment does not constitute evidence of any kind. U.S. v. Wedelstedt, 589 F.2d 339, 350, (8th Cir. 1978), cert. denied, 442 U.S. 916, 99 S.Ct. 2836, 61 L.Ed. 2d 283 (1979).

In U.S. v. Polowichak, 783 F.2d 410, (4th Cir. 1986), the United States Court of Appeals held:

"The submission of an indictment to the jury is a discretionary matter with the district court. See, e.g., U.S. v. Coward, 669 F.2d 180, 184 (4th Cir.), cert. denied, 456 U.S. 946, 102 S.Ct. 2014, 72 L.Ed. 2nd 470 (1982). If the Indictment contains irrelevant allegations, ordinarily they should be redacted. But where, as here, the jury is unequivocally instructed that the indictment is not evidence, that the indictment is distributed solely as an aid in following the Court's instructions and the arguments of counsel, and that certain counts should be disregarded as irrelevant to the defendants currently before the district court, we perceive no reversible error. (U.S. v. Polowichak, at 413, emphasis added).

It is asserted that although the learned Trial Court instructed the jury that the indictment is not evidence, the learned Trial Court erred in not redacting the allegations contained in Count I, subparagraph (3) of the Indictment, or in the alternative, not specifically instructing the jury that the allegation contained in Count I, subparagraph (3), that Defendant King was the National President of the Pagan Motorcycle Club was not supported by any evidence and was therefore irrelevant and immaterial to their deliberations.

It is asserted that Defendant King was prejudiced by the Trial Courts failure to redact the allegation that he was the National President of the Pagan Motorcycle Club or to specifically instruct the jury to disregard the allegation. This is



especially true where the nature of the Indictment concerns the allegations of an illegal enterprise affecting interstate commerce and that Defendant King was the National President of said illegal enterprise.

The Indictment alleged that the National President was the "final authority" in Pagan Motorcycle Club Business.

An instruction by the Trial Court that the indictment is not evidence has no real effect as to allegations of this nature. Both Count I and Count II of the indictment charge the several defendants with participating in a structured organization. The indictment describes the organization as comprised of a "Mother Chapter" acting as a governing body with a president, vice president, treasurer and sergeant at arms.



The members of the organization and the members of the "mother chapter" are subject to the final authority of the "national president".

III. Q. DID THE TRIAL COURT ERR IN DENYING DEFENDANT KING'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT IV OF THE INDICTMENT, IN THAT THE GOVERNMENT FAILED TO PROVE THAT THE DEFENDANT POSSESSED PHENCYCLIDINE ON OR AROUND THE LAST WEEK OF MAY, 1983?

A. YES

The Government alleged in Court IV of it's indictment the following:

"In or around the last week of May 1983, in the Western District of Pennsylvania, the defendant, Merle King, a/k/a "Jackpot" did knowingly,



intentionally and unlawfully possess with intent to distribute a quantity of phencyclidine, in the form of "Killer weed", a schedule II controlled substance"

At trial, the Government presented the testimony of the witness Kenneth Ronald Weaver, whose testimony was the only evidence presented as to this substantive count of the indictment. The evidence elicited as to this count is brief.

"Q. Explain to the jury, first of all, when any other deals would have occurred?

A. It was around Memorial Day of 1983. We had a run on the farm, which I was staying at a motel in the New Stanton area. And Merle King and White Bear came to my room and White Bear informed me that he wanted five --

MR. BILIK : Object to anything White Bear said, your Honor.

THE COURT: Who was present when White Bear said what he said?

THE WITNESS: Merle King.



MR. CONLEY: Merle King,
your Honor, and the witness.

THE COURT: The objection
is overruled.

A. (continuing) -- And he informed me that he wanted five pounds of killer weed for -- for Jackpot.

BY MR. CONLEY:

Q. And at the time this occurred, did Mr. King say anything?

A. Yeah. He says he wanted it. And White Bear turned around and said, "Look. Go sit in your car and I'll bring it out."

Q. And did Merle King leave at that point?

A. Yes, he did.

Q. And what did you do?

A. I gave five pounds of green to White Bear.

Q. And were you paid for that?

A. No. That was his share. He was in partnerships with that particular cook of green." (T.R. 20-21)



Title 21, United States Code, Section
841(a)(i) provides as follows:

"It shall be unlawful for any person knowingly or intentionally

--

(i) To . . . possess with the intent to distribute or distribute . . . a controlled substance."

In order for the crime of possession with intent to distribute a controlled substance to be established, the Government must prove, beyond a reasonable doubt, all of the following essential elements:

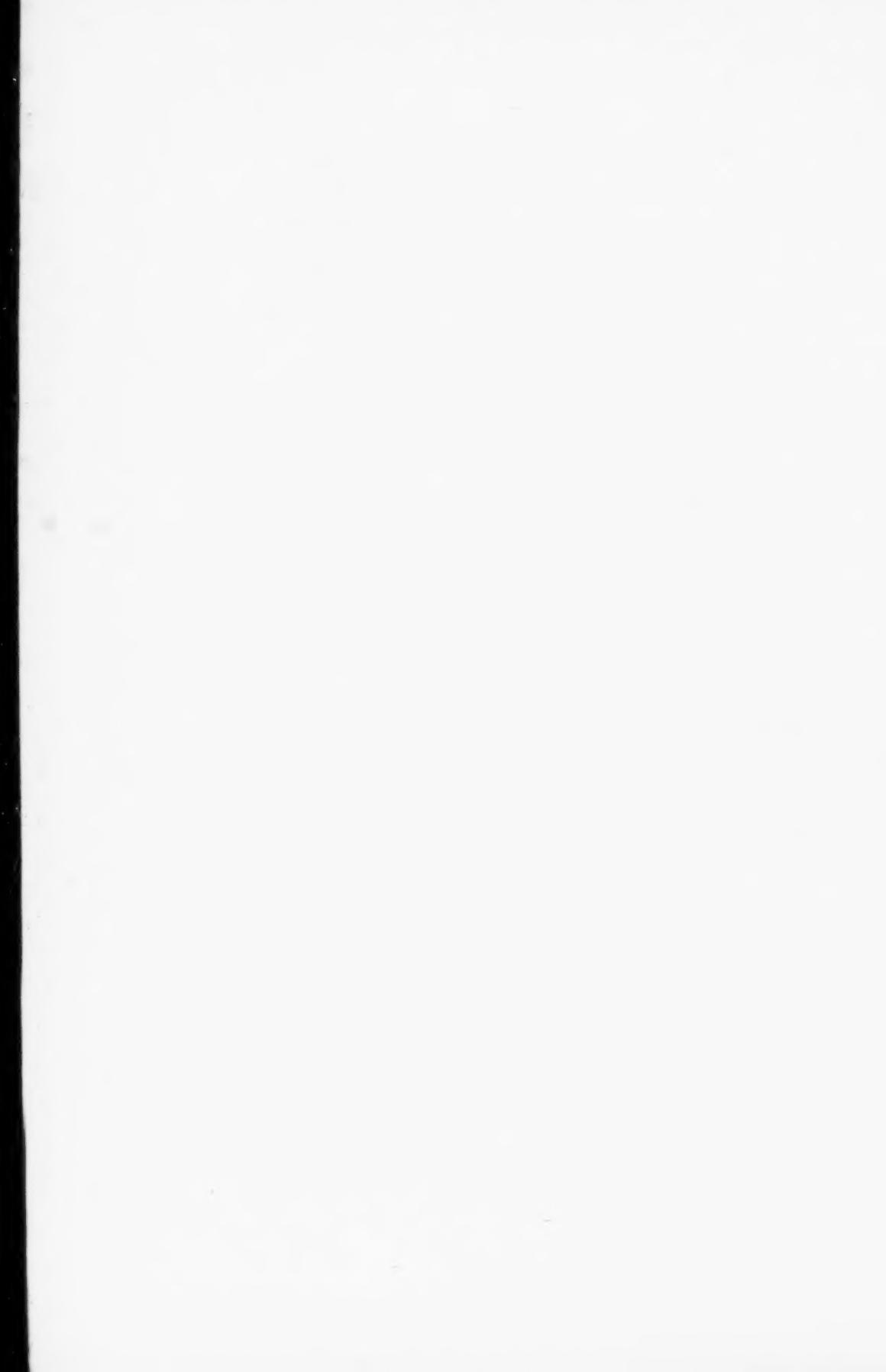
(1) That on the date set forth in the indictment, the defendant possessed with the intent to distribute a controlled substance. U.S. v. Lartey, 716 F.2d 955, 967 (2d Cir. 1983); U.S. v. Wright, 593 F.2d 105, (9th Cir. 1979); U.S. v. Tighe, 551 F.2d 18, (3rd Cir.), cert. denied 434 U.S. 823(1977).



The Government failed to prove the necessary essential element of possession as to Count IV. The Government's evidence as to this count is wholly contained in the testimony of the witness Weaver above.

That testimony in the best light to the Government, establishes that possession of the substance was given to a person named White Bear. The testimony as elicited from the witness stops at the point. There exists no testimony that the substance was given to or received by the defendant.

There is lacking any testimony that White Bear left the premises with the contraband, proceeded to the car or anything of the like. The Government's proof that White Bear was given the contraband without follow-up testimony as to White Bear's actions or the location of the contraband,



causes the jury to speculate as to what happened next. Regardless, it is a failure by the Government to prove the essential element of possession by the defendant, either directly or circumstantially.

The District Court erred in denying the defendant's Motion for Judgment of Acquittal. The Government clearly failed to prove the essential element of possession.



CONCLUSION

For the reasons urged herein, it is
respectively requested that a Writ of
Certiorari issue to review and reverse the
judgment of the United States Court of
Appeals for the Third Circuit entered
herein.

Dated: August 9, 1989

Respectfully submitted,



Edward J. Bilik,
Attorney for Petitioner



UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

NO. 88-3619

UNITED STATES OF AMERICA,

v.

MERLE EDWARD KING, a/k/a Jackpot;
GARY HAROLD KEITH, a/k/a Biggy;
KENNETH DAVID MURRAY, a/k/a Iceman;
RONALD JOSEPH MARINO, a/k/a Dago;
ROGER ALLEN HAYES, a/k/a Haze; and
CHERYL KEITH

MERLE E. KING,

Appellant

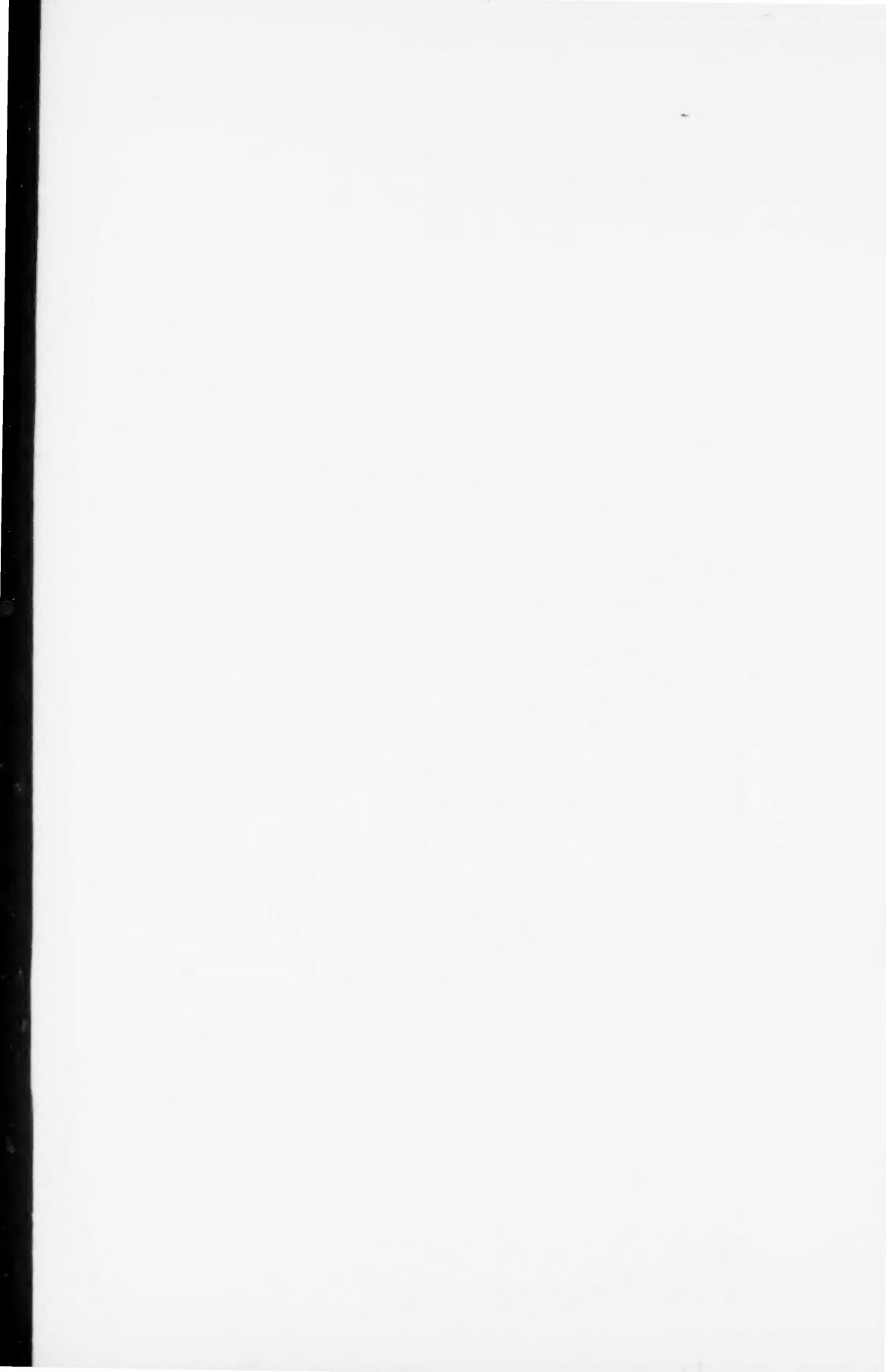
On Appeal from the United States District
Court for the Western District of
Pennsylvania (Pittsburgh)
(D.C. Criminal No. 88-61-1)
District Judge: Gustave Diamond

Submitted Under Third Circuit Rule 12(6)
June 15, 1989

Before: SLOVITER and COWEN, Circuit Judges
and ROTH, District Judge.*

JUDGMENT ORDER

We have considered all of the
contentions of the defendant, to wit,
Honorable Jane Roth of the United States
District Court for the District of Delaware
sitting by designation.



1. Did the district court err in denying the defendant King's request for limiting instruction to the jury as to the proper consideration to be given the evidence of defendant's possession of firearms and other weapons under Rule 404(b) of the Federal Rules of Evidence;
2. Did the trial court err in denying defendant King's motion to redact from the indictment prior to submitting it to the jury the allegation that the defendant was the "National President of the Pagan Motorcycle Club" when no evidence of such was produced by the government; and
3. Did the trial court err in denying defendant King's motion for judgment of acquittal as to Count IV of the indictment, in that the government failed to prove that the defendant possessed phencyclidine on or around the last week of May, 1983.



After consideration of the contentions
raised by appellant, it is
ADJUDGED AND ORDERED that the judgment
of the district court be and is hereby
affirmed.

BY THE COURT:

/s/
Circuit Judge
ATTEST:

s/s
Sally Mrvos, Clerk

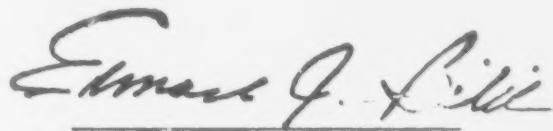
Dated: June 20, 1989
Certified to be a true copy and issued in
lieu of formal mandate on July 12, 1989.
Test: Chief Deputy Clerk, U.S. Court of
Appeals for the Third Circuit



CERTIFICATE OF SERVICE

I, Edward J. Bilik, Esquire, do hereby
certify that three (3) true and correct
copies of the within Petition for Writ of
Certiorari was served by mail to and upon
the following:

BONNIE R. SCHLUETER, ESQUIRE
ASSISTANT U.S. ATTORNEY
633 Federal Court House & P.O. Bldg.
Pittsburgh, Pennsylvania 15219



Edward J. Bilik
Edward J. Bilik, Esq.

Dated: August 9, 1989